OAH Docket No. 4-1004-10963-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of the Insurance Agent License of Joseph Scott Weil, License No. IN 579586

RECOMMENDATION ON MOTION FOR SUMMARY DISPOSITION

This matter was initiated by the Minnesota Department of Commerce (hereinafter the "Department") by an Order to Show Cause, Order Summarily Suspending License, and Notice of and Order for Hearing, dated February 2, 1997, which was served upon Joseph Scott Weil (hereinafter the "Licensee"). The Notice of Hearing stated, among other things, that pursuant to Minn. Stat. § 60K.11, subd. 2 (1996), a hearing was to be held on March 5, 1997, at which the Licensee would have an opportunity to show cause why the Commissioner should not revoke or suspend the Licensee's insurance agent license, censure him, or impose a civil penalty. Subsequently, for good cause, the hearing was continued indefinitely to permit the parties to engage in discovery. A telephonic pre-hearing conference was conducted on May 29, 1997, as a result of which the parties were given until July 8, 1997, to file any motions for summary disposition. Responses to dispositive motions were to be received no later than July 22, 1997, and reply briefs, if any, by August 5, 1997. Oral argument on any motions for summary disposition was scheduled to be heard at 9:30 a.m. on Tuesday, August 12, 1997.

On July 8, 1997, the Department served and filed a written motion and supporting documentation pursuant to Minn. R. 1400.5500 (K) and 1400.6600 (1995) requesting a summary disposition in its favor on the grounds that no genuine issue of material fact exists with respect to this proceeding and that, as a matter of law, uncontroverted facts establish the Commissioner's authority to impose disciplinary measures upon the Licensee's insurance agent license under Minn. Stat. § 45.027, subd. 7 and § 60K.11, subds. 1 and 2 (1996). On August 8, 1997, the Licensee served and filed his response to the Department's motion for summary disposition requesting denial of that motion. At the hearing the Department also made a oral motion that its motion for summary disposition be deemed unopposed or, alternatively, that the Licensee be found to be in default for his failure to serve and file his response to the Department's motion for summary disposition within the time prescribed by the Administrative Law Judge's scheduling order.

The above-entitled matter is before the undersigned Administrative Law Judge on the motions of the Department of Commerce for summary disposition and for sanctions against the Licensee for failure to comply with the scheduling order. Timothy D. Webb, Assistant Attorney General, Suite 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Minnesota Department of Commerce (hereinafter the "Department"). Jerry Strauss, Attorney at Law, Suite 228, 250 Second Avenue South, Minneapolis, Minnesota 55401-2169, appeared on behalf of the Respondent, Joseph Scott Weil (hereinafter the "Licensee"). The record closed on this motion on August 12, 1997, at the close of oral argument on the Department's motion for summary disposition.

Based upon all of the records, files, and proceedings herein, IT IS HEREBY RECOMMENDED :

(1) That the Department's motion for sanctions against the Licensee for failure to comply with the briefing schedule established for motions for summary disposition be DENIED;

(2) That disciplinary action by the Commissioner against Joseph Scott Weil and his insurance agent license be deemed in the public interest; and

(3) That the Department's Motion for Summary Disposition be GRANTED.

Dated this _____ day of August, 1997.

_____
BRUCE H. JOHNSON
Administrative Law Judge

MEMORANDUM

The Department filed and served an Order to Show Cause, Order Summarily Suspending License and Notice of and Order for Hearing upon the Licensee on February 2, 1997. The substance of the Department's claim against the Licensee is that in a position of trust as employee benefits manager for his employer, he intercepted checks intended for his employer and thereafter converted funds in excess of $2,500 belonging to his employer to his own personal use and benefit without his employer's knowledge or permission. The Department contends that the Licensee's conduct violated Minn. R. 2795.0300 and 2795.1000 (1995) and several subsections of Minn. Stat. § 60K.11, subd. 1 (1996), making him subject to discipline and civil penalties under Minn. Stat. § 60K.11, subd. 1, and § 45.027, subd. 6 (1996).

The Department's Burden

In considering motions for summary disposition in administrative contested case proceedings, administrative law judges look to the standards developed in district court practice for considering motions for summary judgment. See Minn. Rules, pt. 1400.6600 (1995). Like summary judgment, summary disposition is appropriate "where there is no genuine issue as to any material fact." Minn. Rules, pt. 1400.5500(K) (1995); compare Minn. R. Civ. P. 56.03; Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Theile v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). In a motion for summary disposition made by the party having the burden of proof, the initial burden is on the moving party to show facts that establish a prima facie case and to assert that no material issues of fact remain for hearing. Id. Once the moving party has established a prima facie case, the burden shifts to the non-moving party. Minnesota Mutual Fire and Casualty Company v. Retrum, 456 N.W.2d 719, 723 (Minn. App. 1990). To successfully resist a motion for summary disposition where a prima facie case has been established, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986). General averments are not enough to meet the non-moving party's burden under Minn. R. Civ. P. 56.05. Id.; Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988). However, the evidence introduced to defeat a summary judgment motion need not be admissible trial evidence. Carlisle, supra, 437 N.W.2d at 715 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

Facts

To establish its prima facie case, the Department relied primarily on a transcript of a proceeding in Hennepin County District on February 25, 1997[1], in which the Licensee entered a plea of guilty to a criminal charge of theft by trick in violation of Minn. Stat. § 609.52, subd. 2(4) (1996), which provides:

> Subd. 2. **Acts constituting theft**. Whoever does any of the following commits theft and may be sentenced as provided in subdivision 3:
>
> * * *
>
> (4) by swindling, whether by artifice, trick, device, or any other means, obtains property or services from another person;

In the course of that proceeding, the Licensee testified under oath that he had worked for his employer, Twin City Group Insurance Company, for about 13 years, and that in the course of his employment he received at the end of the year a number of bonus checks, some of which were made out in his name but all of which represented funds that belonged to the company. The Licensee further testified that from January to August of 1994 he deposited checks in excess of $2,500 into his personal bank account, and that he did not have his employer's permission to take that money.[2]

On February 25, 1997 the Licensee was convicted of theft by trick on the basis of his guilty plea and the testimony he gave in support of it.[3] At a sentencing hearing in Hennepin County District Court on May 20, 1997, the Licensee received a five-year stay of imposition of sentence[4] under Minn. Stat. § 609.135 (1996), which provides in part:

> Subdivision 1. **Terms and conditions**. Except when a sentence of life imprisonment is required by law, or when a mandatory minimum sentence is required by section 609.11, any court may stay imposition or execution of sentence and . . . may place the defendant on probation with or without supervision and on the terms the court prescribes, including intermediate sanctions when practicable.

Appropriateness of Summary Disposition

The Department first contends that it may take disciplinary action against the Licensee and his insurance agent license solely on the basis of his guilty plea and conviction in Hennepin County District Court. Minn. Stat. § 60K.11, subd. 1 (1996) provides in part:

> Subdivision 1. **Grounds**. The commissioner may by order take any or all of the following actions:

(1) deny, suspend, or revoke an insurance agent or agency license;

(2) censure the licensee; or

(3) impose a civil penalty as provided for in section 45.027, subdivision 6.

In order to take this action the commissioner must find that the order is in the public interest and that the applicant, licensee, or in the case of an insurance agency, partner, director, shareholder, officer, or agent of that insurance agency:

* * *

(iv) has pled guilty, with or without explicitly admitting guilt, pled nolo contendere, or been convicted of a felony, gross misdemeanor, or misdemeanor involving moral turpitude, including, but not limited to, assault or similar conduct;

The penalty for the offense of theft by trick is ". . . imprisonment for not more than ten years or . . . payment of a fine of not more than $20,000, or both, if the value of the property or services stolen exceeds $2,500 . . . ." Minn. Stat. § 609.52, subd. 2(4) (1996). The Licensee's offense is therefore a felony.[5] In short, the Licensee's guilty plea of February 25, 1997, establishes a prima facie basis for suspending or revoking his insurance agent license under Minn. Stat. § 60K.11, subd. 1(iv) (1996).

As additional grounds for taking disciplinary action against the Licensee's insurance agent license, the Department cites Minn. Stat. § 60K.11, subd. 1 (iii), (v), (x), and (xi) (1996), which provide:

(iii) has engaged in an act or practice, whether or not such act or practice involves the business of insurance, which demonstrates that the applicant or licensee is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act as an insurance agent or agency;

(v) has violated or failed to comply with any of the provisions of the insurance laws including chapter 45 or chapters 60A to 72A or any rule or order under those chapters;[6]

(x) has engaged in any fraudulent, coercive, deceptive, or dishonest act or practice whether or not such act or practice involves the business of insurance;

(xi) has improperly withheld, misappropriated, or converted to the licensee's or applicant's own use any money belonging to a policyholder, insurer, beneficiary, or other person;

Testimony which the Licensee gave under oath at the time he entered his guilty plea[7] establishes prima facie bases for suspending or revoking the Licensee's insurance

agent license under all four of those sections of Minn. Stat. § 60K.11, subd. 1 (1996). According to his testimony, he diverted funds belonging to his employer into his personal checking account for his own personal use and without the employer's permission. This establishes a prima facie case of untrustworthiness and financial irresponsibility under Minn. Stat. § 60K.11, subd. 1 (iii). That conduct also indicates that he fell short of the "high standards of commercial honor" required by Minn. R. 2795.1000. The Licensee's actions also represent a prima facie showing of "fraudulent" and "dishonest" acts and practices within the meaning of Minn. Stat. § 60K.11, subd. 1 (x). Finally, that conduct also establishes a prima facie case of misappropriation or conversion of money belonging to another person within the meaning of Minn. Stat. § 60K.11, subd. 1 (xi).

To resist the Department's motion for summary disposition successfully, the non-moving party must show that there are facts in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal, supra. Here, the Licensee argues that genuine disputes over material facts exist with respect to all of the statutory grounds for discipline which the Department relies upon. With respect to Minn. Stat. § 60K.11, subd. 1 (iv), the Licensee claims that an issue exists as to whether a conviction actually occurred. He points to the fact that in the sentencing hearing that was conducted in Hennepin County District Court on May 20, 1997, he received a five-year stay of imposition of sentence under Minn. Stat. § 609.135 (1996). The Licensee argues that by operation of that statute, no conviction will occur until the expiration of his five-year probationary period.

But this argument ignores Minn. Stat. § 609.02, subd. 5 (1996), in which the legislature expressly defined the term "conviction" as it relates to criminal law in Minnesota:

> Subd. 5. **Conviction**. "Conviction" means any of the following accepted and recorded by the court:
>
> (1) A plea of guilty; or
>
> (2) A verdict of guilty by a jury or a finding of guilty by the court. [Emphasis supplied.]

On February 25, 1997, the Licensee entered a plea of guilty to theft by trick in violation of Minn. Stat. § 609.52, subd. 2(4) (1996). His guilty plea was accepted and recorded by the court.[8] The question then becomes one of what effect, if any, the subsequent stay of imposition of sentence had upon the use of that earlier guilty plea in a subsequent disciplinary proceeding by a licensing authority, such as the Department. In Warsett v. City of Crystal, 246 N.W.2d 182 (Minn. 1976), the Minnesota Supreme Court addressed precisely that issue and decided it. There, the owner of a liquor store pled guilty to selling liquor to a minor in violation of the city code. Pursuant to Minn. Stat. § 609.135, the court accepted the guilty pleas but stayed imposition of sentence for one year. Thereafter, the licensee sought to enjoin the city from suspending his liquor license under another city ordinance allowing suspension of a liquor license upon conviction of an offense relating to the sale of intoxicating liquors. The licensee argued

that the "conviction which the ordinance specified as a ground for revocation or suspension of a license contemplates a determination of guilt accompanied by the imposition of a sentence . . ." Id. at 184. Unlike this case, the term "conviction" was not even defined in the city code. The Court ruled that the licensee "had been convicted at the point when his pleas of guilty was entered," and that the city therefore had legitimate grounds for suspending his liquor license. Id. Applying the same principles to the uncontroverted facts in this matter, the Licensee has been convicted of an offense that is described in Minn. Stat. § 60K.11, subd. 1(iv) (1996). That conviction therefore represents grounds for disciplinary action by the Department against the Licensee's real estate broker license.

The Licensee also asserts that issues of fact exist with respect to whether he is untrustworthy and financially irresponsible, as to whether his actions were fraudulent, and as to whether he actually had an intent to deceive at the time he diverted funds belonging to his employer into his personal account. All of these facts are reasonably inferable from the testimony the Licensee gave in the course of the his guilty plea hearing. Moreover, principles of collateral estoppel render those underlying facts incontrovertible. See Falgren v. State Board of Teaching, 545 N.W.2d 901 (Minn. 1996). The inferences that can be drawn from those facts –- that the Licensee has acted in an untrustworthy, financially irresponsible, fraudulent, and deceptive manner –- are extremely strong. In response, the Licensee has offered nothing more than his own bald assertions that he was not untrustworthy, irresponsible, fraudulent, or deceptive. As previously noted, general averments are not enough to meet the non-moving party's burden of overcoming a prima facie case when attempting to resist a motion for summary disposition. Hunt v. IBM Mid America Employees Federal, supra; Carlisle v. City of Minneapolis, supra. In short, the issues of fact which the Licensee contends exist cannot be considered genuine ones.

It is for these reasons that the Department's motion for summary disposition should be granted.

B. H. J.

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[1] Exhibit A to the Department's Memorandum of Law.

[2] Id.

[3] Id.

[4] Exhibit B to the Department's Memorandum of Law.

[5] Minn. Stat. § 609.02, subd. 2 (1996) defines "felony" as "a crime for which a sentence of imprisonment for more than one year may be imposed."

[6] The rule the Department contends that the Licensee has violated is Minn. R. 2795.1000 (1995) which provides:

Every agent must observe high standards of commercial honor and just and equitable principles of trade in the conduct of the agent's insurance business.

[7] See p. 4, supra; see also, Exhibit A.

[8] Exhibit A to the Department's Memorandum of Law.